AMERICAN OVERSIGHT

November 29, 2018

The Honorable Henry Kerner
Office of Special Counsel
1730 M Street NW
Washington, DC 20036

Dear Special Counsel Kerner:

On November 27, 2018, the Office of Special Counsel ("OSC") issued Guidance to federal agency ethics officials concerning whether certain conduct or terminology qualifies as prohibited "political activity" under the Hatch Act ("November 27 Guidance"). American Oversight writes to raise significant concerns about OSC's positions and to urge OSC to withdraw the November 27 Guidance until it can be clarified.

The November 27 Guidance addresses three issues: (1) whether strong criticism or praise of an administration's policies is considered political activity; (2) whether advocating for or against the impeachment of an official who is also a candidate for public office is considered political activity; and (3) whether activity related to "the Resistance" is considered political activity.

OSC gets it right with respect to the first question: whether strong criticism or praise of an administration policy constitutes prohibited political activity depends on the context, including its proximity to the policy decision or action in question or its proximity to an election. OSC correctly notes that "[t]here are no magic words" that cause policy opinions to veer into prohibited Hatch Act activity.

However, OSC next takes the position that there are, indeed, some "magic words"—namely "impeach" and "resist" (and their variants)—that are strictly prohibited. This raises logical, policy, and constitutional concerns.

Individuals who violate the Hatch Act should be held accountable. But as with any policy advocacy or opinion, context matters. The correct approach to questions of impeachment and resistance is more nuanced than the categorical approach outlined in the November 27 Guidance.

Impeachment Advocacy

OSC takes the position that advocating for or against the impeachment of an official who is also candidate for public office—for example, the sitting president, Donald Trump, who announced his reelection campaign in 2017—is inherently "political activity" because impeachment not only removes an individual from their existing office but also serves to disqualify him or her from holding office in the future. Therefore, OSC reasons, advocating for or against impeachment of a sitting official is also advocating for or against the official's future election because the official would be barred from holding office.

OSC's position on impeachment advocacy or opinions goes too far. While the Hatch Act is an important safeguard against partisan political bias in the government, certainly there is a difference between advocating that an official should (or should not) be elected and advocating that an official did (or did not) commit treason or high crimes and misdemeanors under the Constitution. Public employees swear an oath to uphold the Constitution; surely, they can express opinions about whether other officials have acted in violation of that oath. That the *consequence* of impeachment includes future electoral disqualification is attenuated from the Hatch Act's primary focus on preventing political activity within our apolitical government. Few, if anyone, would advocate for or against impeachment because of the collateral effect on an official's ability to hold future office (no one thinks, "If only we could impeach official X so he won't win reelection"—the super-majoritarian bar for impeachment is much higher than what is necessary to win an election).

Likewise, OSC's position on impeachment advocacy suffers from overbreadth and could dangerously constrain whistleblowers. As OSC knows well, it is critically important to ensure public employees are comfortable raising concerns about waste, fraud, or abuse in the government. Impeachment is primarily a remedy for severe misconduct. If public employees are aware of conduct that could be impeachable but fear civil or criminal liability under the Hatch Act for saying so, they may be reluctant to approach OSC, inspectors general, or Congress. OSC's guidance creates the illogical circumstances in which public employees can report conduct and call it a "crime" but cannot call it a "high crime."

The November 27 Guidance's attenuation from the core of the Hatch Act's purpose also could have constitutional implications. While the Supreme Court has repeatedly upheld the constitutionality of the Hatch Act as a permissible, neutral limit on public employees' partisan activities, *see United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947), its enforcement nonetheless can trigger First Amendment concerns. Critically, the Court's holdings emphasize that the Hatch Act restrictions are neutral, "not aimed at particular parties, groups, or *points of view*." *National Ass'n of Letter Carriers*, 413 U.S. at 564 (emphasis added). As a consequence, the law does not pressure employees to vote a certain way or to curry favor with superiors rather than follow their own beliefs. *Id*. at 566. Unlike the Hatch Act itself, OSC's November 27 Guidance is specific with respect to "particular . . . points of view" in that it equates impeachment advocacy with the view that an official should be barred from holding future office. However, unless an employee connects his or her views on impeachment to an official's status as a candidate, it would be reasonable to interpret the employee's statement simply as a position on whether the official has committed treason or high crimes and misdemeanors. It is not clear that there should be a difference if a public employee says an official who is also running for office is a "criminal" versus a "high criminal."

Finally, OSC's impeachment advocacy guidance suffers from illogic. As the Guidance notes, the Hatch Act does not constrain advocating for the impeachment of an official who is not running for office. Though an official's status as a candidate certainly affects the Hatch Act analysis for commentary directed at that official, it should not operate as a categorical bar on raising

impeachment level concerns about the official's conduct any more than criticizing that official's policy decisions.

Resistance Activity

OSC's position on activity related to "the Resistance" also suffers from overbreadth. OSC takes the position that while "resistance" activities began as an articulation of efforts to oppose Trump administration *policies*, the terminology around the activity has become "inextricably linked with the electoral success (or failure) of the president." Accordingly, OSC holds that the terms "resist" or "resistance," used on their own, are categorically barred by the Hatch Act while public employees are on duty. Apparently, it would be permissible for a public employee to use the terms in connection with policy advocacy, such as "resist family separation."

OSC makes no showing to support its conclusion that "resistance" terminology has become "inextricably linked" with President Trump's electoral success. It is not clear that this view is correct. Public employees who have been displaying "resistance" signs at work for months or longer may be surprised to learn OSC's position. The Hatch Act does not prohibit employees from objecting while on duty to administration actions or policies; indeed, the First Amendment often protects their right to do so. As originally conceived—and as many still likely conceive it—the "Resistance" was focused on opposing policy actions the president and his administration are taking in office, *i.e.*, not in the context of engaging in electoral activity to defeat the president in the next election. If resistance terminology can become inherently "political activity," so too could statements like "Build the Wall" or "Protect Our Care," which reflect policy positions that nonetheless are tied to the president's campaign positions.

In addition, conflating resistance terminology with electoral advocacy opens the door to public employees being retaliated against for their policy positions or opinions. There have been troubling reports of political appointees targeting members of the so-called "deep state" based on their perceived lack of fealty to the president. To be sure, public membership in "the Resistance" may indicate such a lack of fealty, but employees who identify as such are nonetheless protected from retaliation. If using resistance terminology is categorically barred under OSC's Hatch Act interpretation, it could create new, insidious tools for appointees to target public employees under color of law. Finally, the overbreadth of OSC's position may run afoul of the First Amendment.

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American Oversight respects and values OSC's important role in enforcing the Hatch Act. As an organization dedicated to accountability and ethics in government, we rely on OSC to take appropriate steps to investigate and enforce violations of law when we identify them. However, the November 27 Guidance raises concerns and should be withdrawn until it can be developed and changed to ensure it does not impinge on the constitutional rights of public employees, unduly chill whistleblowers, insulate public officials from criticism, or empower retaliation.

Sincerely,

AMERICAN OVERSIGHT

Austin Evers
Executive Director